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No. 432

IN THE

Supreme Court of the United States

October Term, 1950.

WALTER G. HOUGLAND, INC., Owner of Motor Vessel Walter G. Hougland, and MOTOR VESSEL WALTER G. HOUGLAND, Her Engine, Tackle, Etc., - - - - Appellants,

versus

GEORGE MUSCOVALLEY, SR., Owner of Tugboat J W S, - - - - - - Appellee.

PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COUPT TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Appeal from the United States District Court for the Western District of Kentucky.

JAMES G. WHEELER,
c/o Wheeler & Marshall,
Paducah, Kentucky,
Attorney for Appellants.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

IN THE

Supreme Court of the United States

October Term, 1950.

WALTER G. HOUGLAND, INC., OWNER OF MOTOR VESSEL WALTER G. HOUGLAND, AND MOTOR VESSEL WALTER G. HOUGLAND, HER ENGINE, TACKLE, ETC., - - *Appellants,*

v.

GEORGE MUSCOVALLEY, SR., OWNER OF TUGBOAT J W S, - - - - *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY.

PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The petitioners, Walter G. Hougland, Incorporated, owner of Motor Vessel Walter G. Hougland, and Motor Vessel Walter G. Hougland, her engine, tackle, etc., pray that writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW.

The opinion of the District Court has not been printed in the Federal Supplement. It may be found on pages 37 to 46 of the Transcript of Record. The opinion of the United States Court of Appeals for the Sixth Circuit handed down October 16, 1950, has not yet been printed in advance sheets of the Federal Reporter. It is printed as an appendix to the supporting brief.

JURISDICTION.

This is an application for review of the final decree of the United States Court of Appeals for the Sixth Circuit, affirming the final order of the District Court of the United States for the Western District of Kentucky, in the above styled admiralty suit awarding judgment to the libellant in the amount alleged to have been the value of the boat lost while being towed by the motor vessel Walter G. Hougland.

QUESTIONS PRESENTED.

The decision of the United States Court of Appeals for the Sixth Circuit in this admiralty suit is in conflict with the decision of the United States Court of Appeals for the Second Circuit in the Oceanica, 170 F. 873, and all later cases from the same circuit in which the same question has been considered. In the Oceanica the United States Court of Appeals for the Second Circuit held that an agreement of a towing

contractor to tow at owner's risk relieved the towing contractor from liability for the negligence of those in charge of the tug; that unless the agreement to tow at owner's risk was construed to cover the tug's negligence, the stipulation was meaningless. The Court discussed the doctrine of the Syracuse, 12 Wallace 167, 20 L. Ed. 382, and stated that the case had never been cited by the Supreme Court on this point. In the Oceanica certiorari was denied, and the doctrine of that case has been consistently followed in that Circuit.

The Sixth Circuit based its decision on the Syracuse and followed its earlier dictum in Great Lakes Towing Company v. American Steamship Company, 165 F. 2d 368. The chief question presented is whether an agreement to tow at owner's risk is valid, so as to relieve the towing vessel from liability on account of the want of ordinary care. Petitioners contend that such an agreement is not void or unenforcible. Almost all towing on the inland rivers is done under such agreements, and this magnifies the importance of the question as to the validity of such a covenant in a towage contract. Petitioners contend that while such a covenant would not exempt a tug or her owners from liability for wilful misconduct or for the consequences of negligence "falling greatly below the standard established by law" (Restatement of Contracts, Section 574), it does exempt the tug and her owners from liability on account of ordinary negligence. Petitioners do not concede the correctness of the conclusion of the District Court that those in charge of the Hougland

were negligent but desire that the findings of fact of the District Court be reviewed if this relief is available to them.

Authorities are cited in the supporting brief filed herewith.

WHEREFORE, petitioners respectfully pray that a writ of certiorari be issued.

JAMES G. WHEELER,
c/o Wheeler & Marshall,
Paducah, Kentucky,
Attorney for Appellants.

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CHARLES ELMORE

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The United States Court of Appeals of the Second Circuit has consistently held that an agreement to tow floating equipment at owner's risk exempts the towing contractor, not a common carrier, from liability on account of ordinary negligence. The decision of the United States Court of Appeals for the Sixth Circuit in this case that such a stipulation is void is in irreconcilable conflict with the decisions of the Second Circuit.

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WALTER G. HOUGLAND, INC., OWNER OF
MOTOR VESSEL WALTER G. HOUGLAND,
AND
MOTOR VESSEL WALTER G. HOUGLAND,
HER ENGINE, TACKLE, ETC., - - *Appellants,*

v.

GEORGE MUSCOVALLEY, SR., OWNER OF
TUGBOAT J W S, - - - - *Appellee.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

Muscovalley libeled the Motor Vessel Walter G. Hougland to recover for loss of a small tow boat, which was being towed by the Hougland from Hickman, where the small boat had been sunk, to Paducah, Kentucky, for repairs, or reconditioning. Appeal was prosecuted from a decree in favor of libelant for Six Thousand Dollars ($6,000.00) and the District Court

was affirmed. The District Court found that libelee was free from negligence on any of the charges made in the libel. Sustaining a charge made in an amended libel tendered three and one-half (3½) months after the trial, but never filed, the District Court found the libelee guilty of negligence because it crossed from the Kentucky bank to the Missouri bank following the marked channel near Wolf Island Bar and passed an approaching motor vessel on the starboard instead of the port side. Libelant's boat was made fast on the starboard side of the tow barge in a tow of four (4) loaded oil barges in line. It was lost shortly after the passing above referred to, and the District Court held that the handling of its tow by the Hougland immediately prior to the passing was negligence.

The District Court found that libelee agreed with an insurance adjuster, who was handling the sunken boat for libelant that the towing was to be done at owner's risk. The Court held that this agreement that the towing should be done at owner's risk did not absolve the libelee from negligence on the part of its master or crew (Transcript, page 46). The decision of the trial court was based on dictum in the opinion in Great Lakes Towing Company v. American Steamship Company, 165 F. 2d 368, from the Sixth Circuit, and the Steamer Syracuse, 79 U. S. 167. The United States Court of Appeals for the Sixth Circuit accepted the District Court's findings of fact as to negligence and held that the agreement to tow at owner's risk did not relieve the libelee, or her owners, from liability for ordinary negligence.

ARGUMENT.

The Steamer Syracuse, 79 U. S. (12 Wallace) 167, was decided in 1872. The line of cases citing the Syracuse as authority for the proposition that an agreement to tow at owner's risk is void are based on the following language in the opinion:

> "It is *unnecessary to consider* the evidence relating to the alleged contract of towage, because, if it be true, as the appellant says, that by special agreement the canal boat was being towed at her own risk, nevertheless the steamer is liable if, through the negligence of those in charge of her, the canal boat has suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require, on the part of persons engaged in her management, the exercise of reasonable care, caution, and maritime skill, and if these are neglected, and disaster occurs, the towing boat must be visited with the consequences."

As pointed out by the Court in the Pacific Maru, 8 F. 2d 166, fifty-five (55) years after the decision in the Syracuse, it might be inferred from the language quoted above that the Court was merely expressing the opinion that damage traceable to negligence was thought to be outside the scope of the stipulation; or that according to the apparent intention of the parties the stipulation was applicable only to accidents which might happen without any negligence on the part of the towing contractor. It appears that the Court did not consider the question of the validity of the stipu-

lation. Certainly no opinion was expressed on this point.

The Oceanica, 170 F. 893, was decided by the Circuit Court of Appeals for the Second Circuit in 1909. The owner of a barge made a contract over the telephone with the owner of a tug in accordance with which the barge was to be towed from Marquette to Buffalo at the risk of the owner of the tow. The tug did not drop the tow at Buffalo, but continued on with her on the Niagara River. The tug broke her propeller and cut the line to the tow as the result of which the tow was lost. Considering the agreement to tow at owner's risk, the Circuit Court of Appeals held that unless the agreement was construed to exempt the owners of the tug from the tug's negligence, the stipulation was meaningless. The tug was not a common carrier, and was not liable as an insurer. The Court, therefore, concluded that the stipulation exempted the tug from responsibility for the negligence of those in charge of her and that such a stipulation was valid. The Court discussed the doctrine of The Syracuse, and called attention to the fact that it had never been cited by the Supreme Court on this point. In concluding a supplemental opinion on a rehearing, the Circuit Court of Appeals said that the question should be "set at rest in this case by the Supreme Court." In spite of this certiorari was denied. The doctrine of The Oceanica that an agreement to tow at owner's risk exempts the towing contractor from liability for ordinary negligence has been followed consistently without modification in the Second Circuit.

Monk v. Cornell Steamboat Company, 198 F. 472 (1912);

Ten Eyck v. Director General of Railroads, *et al.*, 267 F. 975 (1920);

Owen McCaffrey's Sons v. Director General of Railroads, 282 F. 728 (1922);

The G. R. Crowe, 287 F. 426 (1922);

The Wireless No. 1, 290 F. 239 (1923);

International M. M. S. S. Company v. W. & A. Fletcher Company, 296 F. 855 (1924););

The Mercer, 14 F. 2d 488 (1926);

The Dalzellite, 48 F. 2d 598 (1930);

The Neils R. Finsen, 52 F. 2d 795 (1931);

Sun Oil Company v. Dalzell Towing Company, 55 F. 2d 63 (1932);

The Primrose, 3 F. Supp. 267 (1933);

The Drayton Thurston, 4 F. Supp. 58 (1933);

Phoenix Cons. Associates v. City of New York, 33 F. Supp. 666 (1940).

There is dictum to the contrary in Petterson Lighterage and Towing Corporation v. The J. Raymond Russell, 87 F. Supp. 467. The Court states that the dictum is inserted because the case would be appealed. It was not appealed.

Courts in other circuits have followed the doctrine of The Oceanica. Mengel v. Inland Waterways (D. C. E. D. La.), 34 F. Supp. 685, The Pacific Maaru (D. C. S. D. of Ga.), 8 F. 2d 166, St. Francis (D. C. Md.), 72 F. Supp. 50. The opinion in the Pacific Maaru is particularly well considered. The Court reviewed the authorities and considered the cases relying on The Syracuse and the cases following the Oceanica.

We have contented ourselves with citing cases from the Second Circuit following the Oceanica. It is repeatedly stated by those courts that the doctrine is well settled in that Circuit. It appears to us that the question of the validity of a stipulation to tow at owner's risk was not considered by the Supreme Court in The Syracuse. The Courts of the Second Circuit have generally taken this view, or have found that the language quoted from the very short opinion in The Syracuse was dictum. To the same effect see The Pacific Maru, *supra*.

It has never been contended that a contract to tow at owner's risk should exempt the tow or her owners from liability for wilful misconduct, or from the consequences of negligence "falling greatly below the standard established by law," or what is referred to in some States as gross negligence. It appears that in the absence of a statute, contracts of exemption from liability for negligence are valid. We quote from the Restatement of the Law of Contracts:

> "Sec. 574. LEGAL BARGAINS FOR EXEMPTION FROM LIABILITY FOR NEGLIGENCE.
>
> "A bargain for exemption from liability for the consequences of negligence not falling greatly below the standard established by law for the protection of others against unreasonable risk of harm, is legal except in the cases stated in Section 575.
>
> Comment:
>
> "a. By negligence is meant any conduct not recklessly disregardful of the interests of others

which falls below the standard established by law for the protection of others against unreasonable risks of harm. By gross negligence is meant conduct falling greatly below that standard."

Almost all towing on the Ohio and Mississippi Rivers is done under an agreement to tow at owner's risk (Transcript, page 134). This magnifies the importance of the question raised by the conflicting rulings of the Second Circuit and the Sixth Circuit. It appeared to us that the reference to the doctrine of The Syracuse in the opinion in Great Lakes Towing Company v. American Steamship Company, 165 F. 2d 368, Sixth Circuit, was dictum. We were in some doubt as to whether the Sixth Circuit would rule that stipulations against negligence were void until a decision of this case. The decision in this case below cannot be reconciled with the rule prevailing in the Second Circuit. We, therefore, respectfully urge that the question should be "set at rest" in this case. It is the position of the libelee that the stipulation against ordinary negligence is not against public policy, but is consistent with common practice on the inland waterways. Such a stipulation should exempt the towing contractor not a common carrier from the consequences of ordinary negligence, or want of ordinary care; otherwise the stipulation is meaningless.

Respectfully submitted,

JAMES G. WHEELER,
c/o Wheeler & Marshall,
Paducah, Kentucky,
Proctor for Appellants.

APPENDIX.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT.

No. 11,145.

WALTER G. HOUGLAND, INC., OWNER OF MOTOR VESSEL WALTER G. HOUGLAND, AND MOTOR VESSEL WALTER G. HOUGLAND, HER ENGINE, TACKLE, ETC., *Appellants,* v. GEORGE MUSCOVALLEY, SR., OWNER OF TUGBOAT J W S, *Appellee.*	Appeal from the United States District Court for Western District of Kentucky.

OPINION BY MARTIN, CIRCUIT JUDGE—AFFIRMING.

Decided October 16, 1950.

Before SIMONS, MARTIN and MILLER, Circuit Judges.

MARTIN, Circuit Judge. A final decree for damages was entered below in favor of the libellant owner of the Tugboat J W S, which was sunk in the Mississippi River as a result, as found by the district court, of the negligent navigation of the pilot of a towing motor vessel, the Walter G. Hougland.

The district judge filed a carefully prepared memorandum, including the findings of fact and conclusions of law in support of his decision, from which it appears that The Hougland was negligent in exposing the "little boat" J W S (which was attached to the starboard side of the aft barge in the tow being pushed upstream by The Hougland) to the direct force of the swells of a down-bound Socony-Vacuum vessel and tow. This negligence consisted in the failure of The Hougland to remain on or near the east bank of the river, in failing to make a port-to-port passing with the down-bound flotilla, and in piloting The Hougland directly across the path of the Socony-Vacuum tow, thereby exposing The J W S to the choppy river, the strong current, and the swells of the Socony-Vacuum tow. The J W S sank in consequence of this negligence.

The findings of fact present in clear detail a narrative of the occurrence, which we deem unnecessary to repeat. These findings are supported by substantial evidence and are certainly not against the clear preponderance of the evidence.

In *Great Lakes Towing Co.* v. *American S. S. Co.*, 165 F. (2d) 368 (C. A. 6), this court held that an appeal in admiralty is a trial *de novo*, but that findings of fact of the trial court will not be set aside unless they are against the clear preponderance of the evidence. See also *The Wilhelm*, 59 F. 169 (C. A. 6, 1893); *The William A. Paine*, 39 F. (2d) 586, 588 (C. A. 6, 1930); and *The Home Insurance Co.* v. *Ciconett*, 179 F. (2d) 892, 896 (C. A. 6, 1950).

The point is made by appellants that the negligent acts shown in evidence and found by the district court were not charged in the libel and that, therefore, the libel should be dismissed. We are unable to accept that argument as sound. After the trial, the libellant tendered an amendment to his libel, which apparently was not officially filed, in which he did charge in broad terms the negligence upon which the district court found liability. As early as 1870,

the Supreme Court held that although a libel in admiralty failed to state the specific sort of negligence which caused a collision but alleged facts not shown; yet, where the true cause of the collision was disclosed by the respondent's witnesses so that respondent could not appropriately allege surprise and it appeared that omission to state the true cause of the collision was without any design, the court would extract the real case from the whole record and decide it accordingly. *The Steamer Syracuse,* 79 U. S. 167. This court has taken a similar position. *Argo S. S. Co.* v. *Buffalo S. S. Co.,* 223 F. 581, 588 (C. A. 6).

Finally, the appellants urge that their undertaking being to tow at the owner's risk, such contract should relieve them of liability for ordinary negligence. This contention cannot be sustained under the authorities, as was pointed out in the opinion of the district judge.

In the *Steamer Syracuse* case, *supra,* the Supreme Court at the outset of its opinion said: "It is unnecessary to consider the evidence relating to the alleged contract of towage, because, if it be true, as the appellant says, that, by special agreement, the canal-boat was being towed at her own risk, nevertheless, the steamer is liable, if, through the negligence of those in charge of her, the canal-boat has suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management, the exercise of reasonable care, caution, and maritime skill, and if these are neglected, and disaster occurs, the towing boat must be visited with the consequences." 79 U. S. 171.

A later Supreme Court decision held that a tug which engages to tow a vessel into port, although not a common carrier nor an insurer, is bound to exercise reasonable skill and care in everything relating to the work until it is accomplished, and she is liable for the want of either to the extent of the damage sustained. *The Margaret,* 94 U. S. 494.

In *Compania de Navegacion Interior, S.A.* v. *Fireman's Fund Insurance Company,* 227 U. S. 66, it was held that a clause in a towage contract declaring that the towing boat shall not be responsible in any way for loss or damage to the tow, does not release the former from loss or damage due to the negligence of her master or crew. See also opinion of this court in *Great Lakes Towing Co.* v. *American S. S. Co.,* 165 F. (2d) 368, 370, 371, *supra.*

The final decree of the district court is affirmed.

JAN 31 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

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OCTOBER TERM, A. D. 1950

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WALTER G. HOUGLAND, INC., Owner of Motor Vessel Walter G. Hougland, and
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GEORGE MUSCOVALLEY, Sr., Owner of Tugboat JWS,
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD B. HAYES,
135 S. La Salle Street,
Chicago, Illinois,
Proctor for Appellee.

BARNARD & MILLER, 33 S. Market St., Chicago 6. FR anklin 2-0561

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The opinion of the Court of Appeals is at Record 205-208.

The opinion of the District Court is at Record 36-46.

All but one sentence of the Petition for certiorari is directed to the question whether by a contract to tow "at owner's risk," the towing vessel is relieved of the conse-

quences of its *negligence.* That is the only question discussed in the Supporting Brief filed in support of the Petition. We address ourselves thereto below, although it is a question which has not only been put at rest, but put beyond argument by this Court's decision (a decision Petitioners do not mention) in *Compania de Navegacion* v. *Fireman's Fund Ins. Co.,* (The Wash Gray) 277 U.S. 66, 73-74 (1928), where this Court rested decision squarely on the citation, approval, and even quotation, of its rule in *The Syracuse,* 79 U. S. 167, 171 (1870).

In nearly its last sentence the Petition remarks that it does not agree with the concurrent findings of negligence by both courts below, and desires review of the findings of fact "if this relief is available."

The Supporting Brief abandons all such questions. No effort is made anywhere to discuss or show any such mistake of fact by the concurring courts below.

We do not understand that a general expression in a Petition for Certiorari, of petitioner's disagreement with findings of fact made by concurrent courts below, without any attempt whatever to point out or show any particular wherein their concurrent views are supposed to have been mistaken, is sufficient to move this Court to search the record for unspecified errors of fact.

If it were otherwise, we suppose any reliance on factual error is waived by total failure of Petitioners in their Supporting Brief to mention any such point.

In any event, we should believe that the reiterated doctrine of this Court in admiralty matters, namely, that this Court will not review concurrent findings below unless clear error is shown, would be decisive. Petitioners make no effort to show such error.

This Court's doctrine as to the force of concurrent findings of fact below, originating in admiralty (and later

extended to equity—*Towson* v. *Moore*, 173 U. S. 17, 24 (1899)) is peculiarly applicable to admiralty situations, where it is often remarked that the subject matter and the notorious loyalty of witnesses to their vessel make it peculiarly difficult for a reviewing court to substitute itself on matters of fact for an experienced district judge who heard and saw the witnesses. Even in equity this is repeatedly said to be the "settled rule of this court" (*Norton* v. *Larney*, 266 U. S. 511, 518 (1924); *Baker* v. *Schofield*, 243 U. S. 114, 118 (1917); *Wright-Blodgett Co.* v. *U. S.*, 236 U. S. 397, 402 (1915) and *Hy-Yu-Tse-Mil-Kin* v. *Smith*, 194 U. S. 401, 412 (1904)) and it is particularly the rule in admiralty. *The Carib-Prince*, 170 U. S. 655, 658 1898).)

Authority as to when such clear error appears as will warrant reversing concurrent findings, is as rare as the occasion for its application, but is helpful as to the force of the rule that, absent a showing of clear error, concurrent findings below are accepted in admiralty. Such a case is *The Ariadne*, 80 U. S. 475 (1871). Decision there turned on failure of the courts below to give effect to uncontradicted evidence showing inattention of the lokout of a vessel. Here, the findings below, based on the evidence of the towing vessel's own captain and pilot even more clearly show a bad lookout by *Petitioner's* vessel.[1] Thus *The Ariadne*, if it would have warranted the Court in reversing the courts below if they had both exonerated the lookout that was kept on Petitioner's vessel, is no

[1]Such findings appear at Record 41 *et sequendo*. As appears on their face, they rely on testimony of the towing vessel's own captain (Speck) and pilot (S. V. Lewis) produced as witnesses by Petitioner (whose cross-examination appears at Record 146-155 and 169-172, respectively), and who, together with the mate (whose cross-examination is at Record 165-172), were the only eyewitnesses of events at and immediately before the disaster produced by Petitioner's towing vessel, whose numerous crew were the only people there. (*The Sea Gull*, 90 U. S. 165, 175 (18); *The New York*, 175 U. S. 187, 204 (1899).)

precedent for reversal when they both convicted it. In *The Ariadne* (decided in 1871 when appeal here was of right) the opinion shows that the court was deliberately impressing on lower courts their duty carefully to enforce the high requirements of vigilance which admiralty insists upon, in respect of the lookout kept by a vessel. The court stated that the judgments below, were presumptively correct (*ibid* 479) but that on the uncontradicted evidence:

> "For all the purposes of this case there might as well have been no lookout on the steamer. * * * If the brig had been seen when she became visible from the steamer, or very soon thereafter, the collision could have been avoided. * * *
>
> "The duty of the lookout is of the highest importance. Upon nothing else does the safety of those concerned so much depend. * * * It is the duty of all courts, charged with the administration of this branch of our jurisprudence, to give it the fullest effect whenever the circumstances are such as to call for its application. Every doubt as to the performance of the duty, and effect of non-performance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary." (*Ibid*, 478, 479)

The last quoted sentences suggest that the reversal turned on failure to apply a rule of law as to the burden of coming forward with testimony.

We cannot suppose that Petitioner's mere general suggestion of dissent from the findings (a suggestion which they then make no attempt to explain or support, but entirely abandon on brief) imposes on us the duty to reargue the case on the facts, after the District Court which heard these facts, and the Court of Appeals, which reviewed them, have unanimously found adversely to Petitioners.

> "As the decision of the District Court was unanimously affirmed by the Circuit Court of Appeals, we do not think there is any such preponderance of evi-

dence as would justify us in disturbing their conclusions."

The Iroquois, 194 U. S. 240, 247-248 (1904).

"These findings were made, after hearing, by the district judge upon undisputed or conflicting evidence. The findings were not questioned by the court below; and since they are not without substantial support in the evidence, we accept them here as unassailable."

Alabama Power Co. v. *Ickes*, 302 U. S. 464, 477 (1937) (An equity matter).

"In support of the judgment of the Circuit Court of Appeals, respondent asks us to review the evidence with respect to the cause of claimant's injuries and the breach of duty by the shipowner, contending that the evidence was insufficient to support the findings. Applying the well-established rule we accept the concurrent findings of the courts below us on these matters (citing auth.) and we confine our attention to the question of the survival of the causes of action."

Just v. *Chambers*, 312 U. S. 383, 384 (1941) (An admiralty matter).

We must suppose also that Petitioner's experienced counsel is as well aware as we are of the foregoing authorities, and that the purpose of the Petitioners' remarks as to the facts is to dull the effect of the consideration that, in approaching the question of law, we must begin with the established *fact* that the Petitioners took in tow a helpless vessel, without a crew, then lost that vessel by negligence—and now seek to escape the consequences of that negligence by arguing that a contract to tow "at owner's risk" does not merely negative the status of a common carrier (which some towers are) so as to relieve from "causes beyond its control," but gives it a license to destroy the towed vessel by negligence. If that was the Petitioner's purpose, it cannot succeed. Even if the most that could be said for a finding of fault were that

it is not clearly erroneous, that finding is accepted as indisputable in considering questions of law. (*The Carib Prince,* 170 U. S. 655, 658 (1898); *Just* v. *Chambers,* 312 U. S. 383, 384, *supra,* (1941).)

Similar motives seem to have produced Petitioner's remark that an amendment to libel was not tendered until after trial. (See opinion of the Court of Appeals, Record 206-207.)

After these distractions *in limine,* the proposition Petitioners attack is this:

> **It is a settled question in this Court that the expression "at owner's risk" or equivalent language in a towing contract, gives the towing vessel no immunity to destroy the towed vessel by want of ordinary care.**

This Court has always so held.

The Syracuse, 79 U. S. 167, 171 (1870).

Compania de Navegacion v. *Fireman's Fund Ins. Co.,* 277 U. S. 66, 70, 73-74 (1928).

Both the courts below are in accord with this court.

The impression that the Petition and its Supporting Brief labor to achieve is that this Court never passed on the question but once, and that in 1872; that there is something doubtful about this Court's views; and that this Court's attitude toward the question is not fully expressed so that an unsettled controversy remains between courts of appeal. We think the real situation is different.

The Syracuse, supra, is plain that such a contract does not confer on the tower the license it claims to destroy the tow by want of ordinary care. It is true that *The Syracuse* was decided in the seventies. It is also true, to quote the learned author of the note in 54 A. L. R. at 247, that "an imposing array of precedents had accumulated," for the view that such contracts by towing vessels were

unavailing to give them an indulgence for their want of ordinary care. (54 A.L.R. 247, and notes.) It is also a fact, as Petitioners do say at length, that "This state of the authorities, however, did not deter two of the members of the court of appeals for the second circuit from holding" the contrary in 1909.[1] It is likewise true that, after denial of certiorari in that case, notwithstanding the rule that denial of certiorari implies no approval by this Court of the merits of the result below (*U. S.* v. *Carver*, 260 U. S. 482 (1932)), the courts of the Second Circuit then for some years proceeded to act as though *The Syracuse* had never been decided, although the courts on the West Coast, including the Court of Appeals for the Ninth Circuit, consistently held the doctrine of *The Syracuse*. (Examples are: *Alaska Commercial Co.* v. *Williams*, 128 Fed. 362, 366 (CA 9, 1904); *Mylroie* v. *British Columbia etc., Co.*, 268 Fed. 449, 452 (CA 9, 1920); *Sacramento Navigation Co.* v. *Salz*, 3 F. (2d) 759, 761 (CA 9, 1925).)

One might suppose from Petitioner's presentation that this remained the situation today. It is not the situation today.

> "The cases *prior to 1928* remained in this divergence but in that year the Supreme Court broke its silence in favor of the position of the courts on the West Coast. In *Compania de Navegacion* v. *Fireman's Fund Insurance Co.* an owner of the tow sued his insurer, who argued that the tow owner had not disclosed that the contract of towage provided that the 'tug' 'will furnish hawser. All other risk to be borne by the towed vessel.' This the insurer claimed was material since it cut off subrogation in violation of the express terms of the policy. In upsetting the defense the court said, 277 U. S. page 73, 48 S. Ct. page 460: 'We do not think that the towing contract has the effect claimed for it by the companies. It did not release the Free-port from any loss or damage to the Wash Gray due

[1] 54 A.L.R. 247, discussing *The Oceanica*, 170 Fed. 893 (1909) reversing 144 Fed. 301, cert. den. 215 U. S. 599.

to the negligence of the master or crew of the towing vessel; and for a loss thus caused the companies would be subrogated to the claim of the owner of the Wash Gray.

" 'The rule laid down by this court in *The Syracuse*, 12 Wall. 167, 171, 20 L. Ed. 382, covers the point.' Chief Justice Taft concluded: ' * * * the towing contract here shown was not a fact material to the risk, a concealment of which from the underwriters would injure them or avoid the policy.' " (Our emphasis.)

Robinson, *Admiralty*, 627.

What this Court said when it "broke its silence" in the *Compania* case, just referred to, was the whole basis of decision of the contested issue to which its language was addressed, and its language was a quotation of the language of *The Syracuse*, referring to it as "the rule laid down by this Court," that "covered the point," for the purpose of showing "the state of the law."

"We do not think that the towing contract has the effect claimed for it by the companies. It did not release the 'Freeport' from any loss or damage to the 'Wash Gray' due to the negligence of the master or crew of the towing vessel; and for a loss thus caused the companies would be subrogated to the claim of the owner of the 'Wash Gray.'

"The rule laid down by this Court in *The Steamer Syracuse*, 12 Wall. 167, 171, covers the point. That was a libel by the owner of a canal boat against the Steamer Syracuse for negligence in towing the canal boat and running her into a vessel at anchor in the harbor of New York. The claim was made that there had been a special agreement between the canal boat and the steamboat by which the canal boat was being towed at her own risk. Upon this point the Court said:

" 'It is unnecessary to consider the evidence relating to the alleged contract of towage, because, if it be true, as the appellant says, that, by special agreement, the canal-boat was being towed at her own risk, nevertheless the steamer is liable, if, through the negligence

of those in charge of her, the canal-boat has suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management, the exercise of reasonable care, caution and maritime skill, and if these are neglected, and disaster occurs, the towing boat must be visited with the consequences.'

"In view of this state of the law, the towing contract here shown was not a fact material to the risk, a concealment of which from the underwriters would injure them or avoid the policy."

Compania de Navegacion v. *Fireman's Fund Ins. Co.*, (*The Wash Gray*), 277 U. S. 66, 73-74 (1928).

It is important to note this was held by this Court in response to citation (*ibid*, 70) of *The Oceanica* and *The Pacific Maru*, on which Petitioners especially rely. This Court's repudiation of their doctrine and its reaffirmance in 1928 of the doctrine of *The Syracuse* as "the law", could not be more pointed.

Since then, there seems to have been but one tentative attempt in the Second Circuit Court of Appeals to question the admiralty rule, and this Court dealt with that on certiorari as follows: In *Sun Oil Co.* v. *Dalzell Towing Co., Inc.*, 55 F.(2d) 63, (CA 2, 1932) the case concerned a pilotage agreement. Such agreements present not merely different language but involve the different situation in which the towed vessel is itself under power and capable of being steered independently, and, in that situation, asks for an employee of the towing vessel to manage it. To ask a member of a tug crew to take the controls of a strange vessel, itself under power or capable of maneuver, is more than towage. By such a pilotage arrangement the towing vessel subordinates itself to the tow (*Great Lakes Towing Co.* v. *American S. S. Co.*, 165 F.(2d) 368, 371, (CA 6, 1948), and ceases to be "the dominant mind and will of the

adventure" (*The Margaret*, 22 F.(2d) 709, 712 (D.C. Pa. 1927); aff'd. 30 F.(2d) 923 (CA 3, 1929); cert. den. 279 U. S. 862; *The Margaret*, 94 U. S. 494 (1876)). *The Court of Appeals for the Second Circuit correctly put its decision on that ground.* But it threw in a dictum to the effect that since *The Oceanica* was so firmly established in the Second Circuit it would not depart therefrom "*unless* the later Supreme Court case clearly demands it" (meaning the *Compania de Navegacion* case, *supra.*) This Court responded by granting *certiorari*, to affirm with this crisp statement:

> "The decree under consideration is not in conflict with the decisions of this court cited by petitioner, *The Steamer Syracuse*, 12 Wall. 167, *Compania de Navegacion* v. *Ins. Co.*, 277 U. S. 66. Neither involved an agreement similar to the provisions of the pilotage clause on which this case turns."
>
> *Sun Oil Co.* v. *Dalzell Towing Co.*, 287 U. S. 291, 295 (1932).[1]

In these decisions this Court's views have been made exceedingly clear. It is at length understood in the Second Circuit that *The Oceanica* is overruled and that the law is what this Court has repeatedly held it to be. In *Petterson Lighterage* v. *Tug J. R. Russell*, 87 F. Supp. 467, 470 (D.C. N.Y. 1949) the court held:

> "Professor Robinson outlines the controversy over the validity of these releases so completely (Robinson on *Admiralty*, 1939, pp. 670-673) that no very elaborate discussion of the matter is necessary here. He concludes that at least obliquely the Supreme Court has held in *Compania de Navegacion* v. *Fireman's Fund Insurance Company*, (*The Wash Gray*), 1924, 277 U. S. 66, 1928 A.M.C. 923, 72 L. Ed. 787, that such contracts as are found here are void. *The Oceanica* (1909, 2 Cir.),

[1] It is unfortunate that Petitioner's Brief (5) cites only the lower court decision of this case, and not the opinion of this Court, above.

170 Fed. 893, cert. den. 215 U. S. 599, sole reliance of *H. A. Meldrum* here, was cited to the Court by counsel, and I think was overruled. There are, however, several decisions the other way in my own district that I ought to mention. *The Primrose*, (E.D. N.Y.), 1933 A.M.C. 586, 3 F. Supp. 267; *The John J. Feeney*, (E.D. N.Y.), 1933, 3 F. Supp. 270, 1933 A.M.C. 637. Both of these cases were decided after the Supreme Court had written in *Compania de Navegacion, supra.* In one of them (*The Primrose, supra*) there is to be found an excerpt from Judge Swan's opinion in *Sun Oil Co.* v. *Dalzell Towing Co., Inc.*, 1932 A.M.C. 149, 55 F.(2d) 63, 65. In substance Judge Swan there said that the rule in the Second Circuit favoring the validity of a tug's contract against negligence (citing *The Oceanica, supra*) was so firmly established that the Court would not think of departing from it 'unless the later Supreme Court case clearly demands it' (meaning the *Compania de Navegacion, supra*). *The Primrose* and *The John J. Feeney, supra,* naturally followed Judge Swan's interpretation of the matter. However, reviewing the same case in which Judge Swan wrote (*Sun Oil Co.* v. *Dalzell Towing Co.*, (1932), 287 U. S. 291, 1933 A.M.C. 35, 77 L. Ed. 311) the Supreme Court was, I think, at pains to point out that *Compania de Navegacion* in fact clearly demanded a departure from the rule of *The Oceanica*, saying that exemption of the tug's owner from liability when its servants are used on the bridge of the tow presents a different question than a general release covering negligence. In short, as I read the decisions, a general release or exemption from liability running to the tower is void; but a special case arises *when the tow is under power* and in control of the tower's servants. In that situation, an exemption against liability on the part of the tower is valid." (Our emphasis.)

There remains nothing ambiguous about "the state of the law" as declared by this Court. (Auth. cit.) It would seem to be time enough to grant certiorari if, as now seems impossible, the Second Circuit should ignore all this Court has said and done.

In view of the state of the law as now declared by this Court, it would appear to be supererogation to reargue the 1909 decision of the Second Circuit in *The Oceanica*, whose citation in the *Compania* case evoked so positive a repudiation of their doctrine and so plain and emphatic a reiteration of the rule of *The Syracuse* in 1928. The dissenting justice in *The Oceanica* left little of persuasion in the views of this brethren. Of the three *ratio decidendi* of the majority in *The Oceanica*, one has disappeared; two never existed. The majority's opinion said, first, that this Court had never reiterated *The Syracuse*, a point that, if it was ever worth anything, disappeared with the *Compania* and *Dalzell* cases. It intimated that *The Syracuse* doctrine was dictum. It was not, on its face; on the contrary, it was the basis of decision in that case. But apart from that, the treatment of the doctrine of *The Syracuse* in the *Compania* and *Dalzell* cases, *supra*, puts in its true light the untenable suggestion of the majority in *The Oceanica*. The majority in *The Oceanica* also said the words "at owner's risk" could have no meaning, unless construed to relieve against negligence. That is hardly true. They serve to negative the status of a common carrier, with its insurer's responsibility. (A tower is not, *qua* tower, a common carrier, but under some conditions can become one, and the inclusion of words that negative a common carrier's status and *absolute* responsibility are consistent with intent that leaves the tower answerable for the consequences of his want of ordinary care. The vessel owner willing to assume the perils of the waters is not by any means saying "you may destroy my vessel by your want of ordinary care.") Even were it otherwise, nothing is more common than for parties to say in their contracts "not responsible for causes beyond our control." (Cf. criticism of *The Oceanica* in 54 A.L.R. 247 and 257 (1928).) Regarded as a question of the construction by admiralty, as settled by repeated decisions of

this Court, of this kind of maritime contract, no question of validity or invalidity arises. But whether as a question of construction not to include exoneration for want of ordinary care, or of invalidity if otherwise construed, the result is that such agreements do not confer on the tower indulgence to destroy the tow by want of ordinary care. (Auth. cit.)[1] Finally, *The Oceanica* refers to the extraordinary statutory rule then prevailing in the state of New York, that even a common carrier could, by contract, require an immunity for the consequences of its negligence. Not only have common carriers been less successful in the Kentucky legislature. (Constitution of the Commonwealth of Kentucky, Kentucky R. S. 1948; Kentucky R. S. Ch. 276, Sec. 276.470.) In so permitting a statutory rule of a state to control an admiralty decision,[2] the majority in *The Oceanica* was transgressing basic concepts of admiralty law under the Constitution. This is a case in admiralty. Except in cases turning on the Constitution, Federal Statutes, and Treaties, there is no general Federal common law; the diver-

[1]The special interest of the nation in vessel property is frequently recognized elsewhere by this Court; e.g., "the policy of Congress to encourage investments in ships"—*Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 158. This Court's language in *The Syracuse*, quoted as the state of the law in the *Compania* case, in rejecting a contract as a defense to a tower for want of ordinary care, seems plain:

> "Although *the policy of the law* has not imposed on the towing boat the obligation resting on a common carrier, *it* does require on the part of the persons engaged in her management, the exercise of reasonable care, caution and maritime skill," etc. (Our emphasis.) (*Ibid*)

See the opinion on Circuit of Waite, C. J. in *Deems* v. *Albany Line*, Fed. Case No. 3736.

[2]It has seemed on careful reading that the local law of the State of New York was the real reason for the opinion of the majority in *The Oceanica*. "A careful examination of the prevailing opinions in that case we think shows that the decision was really based upon the law prevailing in the state of New York, under which even a common carrier may contract against his own negligence," etc. *Mylroie* v. *British Columbia Mills Tug & Barge Co.*, 268 Fed. 449, 452 (CA 9, 1920).

sity clause gives jurisdiction for the purpose of preventing local discriminations against non-residents. (*Erie R. R.* v. *Tompkins*, 304 U. S. 64.) The admiralty clause of the Constitution gives Federal jurisdiction for different reasons; there is a general maritime law, addressed to admiralty situations (*Panama R. Co.* v. *Johnson*, 264 U. S. 375, 385 (1924); *The Belfast*, 74 U. S. 624, 637 (1868); *Insurance Co.* v. *Dunham*, 78 U. S. 1, 25 (1870)) adopted by the Constitution as the law of the United States (*Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 160-161 (1920); *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 244 and note 10 (1942)) subject to change by Congress (*Panama R. Co.* v. *Johnson*, 264 U. S. 375, 385 (1924)) that the Constitution intended should *not* be subject to decisional or statutory control of the states (*Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 244 and note 10 (1942), *Union Fish Co.* v. *Erickson*, 248 U. S. 308, 314 (1918), *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372, 384 (1918), *Janssen* v. *Swedish American Line*, 1950 A.M.C. 1959, 1964, and cas. cit. (CA 1)).

By the admiralty law of the United States neither a common carrier (*Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 461 (1889)) nor a tower (towing is indeed uniquely maritime) exempts himself from the consequences of his want of ordinary care by such a contract. (*The Syracuse*, 79 U. S. 167, 171 (1870) *supra*; *Compania de Navegacion* v. *Fireman's Fund Ins. Co.*, 277 U. S. 66, 70, 73-74 (1928) *supra*.)

It is respectfully submitted that the decisions of the courts below are in entire accord with these principles, which the repeated decisions of this Court since 1909 have made too plain to be misunderstood, and that the Petition for Certiorari should be denied.

Respectfully submitted,

EDWARD B. HAYES,
135 S. La Salle Street,
Chicago, Illinois,
Proctor for Appellee.

JAN 25 1951
CHARLES ELMORE CROPLEY
CLERK

NO. 432

October Term, 1950

In The

SUPREME COURT OF THE UNITED STATES

WALTER G. HOUGLAND, INC., Owner of Motor Vessel Walter G. Hougland, and MOTOR VESSEL WALTER G. HOUGLAND, Her Engines, Tackle, Etc.,

Appellants

vs.

GEORGE J. MUSCOVALLEY, SR., Owner of Tugboat J W S,

Appellee

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

JOHN H. EISENHART, JR.
1319 F Street, N. W.
Washington, D. C.